STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	
Petition for Approval of a Revised	:	Docket No.00-0361
Decommissioning Expense Adjustment	:	
Rider to Take Effect on Transfer of	:	
ComEd's Generating Stations	:	

APPLICATION FOR REHEARING OF THE ENVIRONMENTAL LAW AND POLICY CENTER

Introduction

The Commission's Order issued on December 20, 2000 ("the Order") concluded, contrary to Illinois law, that the Illinois Legislature has authorized the collection of decommissioning expenses by ComEd from its ratepayers after the sale of the ComEd nuclear plants. While the Order authorized ComEd to collect a substantial amount of the decommissioning collections requested by ComEd, the Order also determined that it is inappropriate to require ratepayers to contribute towards non-radiological decommissioning. Since the Order determined that ratepayers would not be required to contribute towards non-radiological decommissioning, the Order did not address the necessity of requiring that ComEd provide assurances that non-radiological decommissioning be completed at all of its plants.

The Environmental Law and Policy Center ("ELPC") respectfully requests that the Commission grant rehearing of its conclusion that the Illinois Legislature has authorized the collection of decommissioning expenses by ComEd after ComEd has sold its nuclear plants and that ComEd should be permitted to recover those expenses from its ratepayers. Illinois

customers cannot be charged expenses for non-jurisdictional assets. ComEd will have no legal right to collect decommissioning funds from its ratepayers once it transfers the plants to Genco.

In addition, ELPC respectfully requests that the Commission grant rehearing of its conclusion that, assuming the collection of the decommission expenses by ComEd is authorized, it is inappropriate to require ratepayers to contribute towards non-radiological decommissioning. ELPC asks that the Commission require that ComEd provide assurances that non-radiological decommissioning will be completed at all of its nuclear plants upon rehearing of the non-radiological decommissioning issue.

Further, ELPC respectfully requests that Commission grant rehearing of its conclusion that ComEd will be permitted to recover $73 million annually in decommissioning costs for the years 2001 through 2004, and, for the years 2005 and 2006, an amount equal to $73 million times the percentage of the actual energy production of the nuclear plants purchased by ComEd in each such year. Assuming that the Commission finds that any collections are legally authorized, the Commission should reduce the amount of recoverable decommissioning expenses upon rehearing.

Argument

Pursuant to 220 ILCS 5/10-113(a) and 83 Ill.Adm.Code §200.880, ELPC seeks rehearing of the Order to address the following issues:

1. Whether permitting ComEd to collect decommissioning expenses for plants it no longer owns is contrary to law and misinterprets and misapplies the Public Utility Act;
2. Whether failing to require ratepayers to contribute towards non-radiological decommissioning and to require ComEd to provide assurances that non-radiological

decommissioning will be completed at all of its nuclear plants is arbitrary and capricious and not supported by substantial evidence based on the entire record of evidence presented in this proceeding.

3. Whether permitting ComEd to recover $73 million annually in decommissioning costs for the years 2001 through 2004, and, for the years 2005 and 2006, an amount equal to $73 million times the percentage of the actual energy production of the nuclear plants purchased by ComEd in each such year, is arbitrarily and capriciously high and not supported by substantial evidence based on the entire record of evidence presented in this proceeding.

I. The Order Should Be Revised to Conclude that ComEd Is Not Legally Authorized to Collect Decommissioning Expenses for Nuclear Plants that It No Longer Owns

The Order concludes that ComEd's proposal, as modified, is authorized by the Public Utilities Act ("Act"). While the Order correctly states that "the Commission's authority must either arise from the express language of the enabling statute or devolve by implication or intent from the express provisions of the statute as an incident to achieving the objectives for which the agency was created," Peoples Gas Light and Coke Company v. Illinois Commerce Commission, 165 Ill.App.3d 235, 520 N.E.2d 46 (1st Dist., 1988), the Order never identifies the express provisions from which the Commission's authority arises. Instead, the Order simply implies the authority it seeks by reading the authority into language of the statute unrelated to the issue of whether utilities are authorized to collect decommissioning expenses for plants they no longer own.

The Order finds "somewhat persuasive" ComEd's argument that Section 9-201.5 of the

Act authorizes ComEd to collect decommissioning expenses after the sale of the plants "because approval of such collections will reduce the amounts that would otherwise be charged to customers under decommissioning tariffs in the future." Order at 17. Section 9-201.5 provides:

> (a) The Commission may after hearing, in a rate case or otherwise, authorize the institution of rate provisions or tariffs that increase or decrease charges to customers to reflect changes in, or additional or reduced costs of, decommissioning nuclear power plants, including accruals for estimates of those costs, irrespective of any changes in other costs or revenues; provided the revenues collected under such rates or tariffs are used to recover costs associated with contributions to appropriate decommissioning trust funds or to reduce the amounts to be charged under such rates or tariffs in the future. These provisions or tariffs shall hereinafter be referred to as "decommissioning rates".

ComEd's argument focuses on the language stating that funds collected pursuant to a decommissioning tariff may be used either to "recover costs associated with contributions to appropriate decommissioning trust funds or to reduce the amounts to be charged under such rates or tariffs in the future." ComEd creatively claims that that the recovery of costs associated with contributions" must refer to the decommissioning funds collected from ratepayers while it owns the plants and, therefore, reducing the amounts to be charged under such tariffs in the future must refer to collections from ratepayers after the utility no longer owns the plants.

Section 9-201.5(a) does contain the slightest reference to decommissioning costs to be collected after a utility no longer owns nuclear plants and there is nothing that provides any basis for the Company's argument and the conclusion in the Order. The two parts of Section 201.5(a) that ComEd and the Order rely upon merely describe the uses of the money collected under the decommissioning tariff. They do not address what entity can collect the decommissioning funds. As to the uses of the funds, the plain meaning of "costs associated with contributions" is the costs the company must incur to obtain decommissioning funds from ratepayers, such as litigating Commission proceedings, and to administer the funds. The meaning of the second part, reducing

funds to be collected under such tariffs in the future, is equally clear. It refers to the use of the money collected through decommissioning rates, to maintain an adequate decommissioning fund as required by the Nuclear Regulatory Commission, which obviously reduces the amount which needs to be collected in the future when decommissioning actually occurs.

The Post Exceptions Proposed Order dated November 13, 2000 from the Hearing Examiner to the Commissioners regarding recommended action at the Bench Session on November 21, 2000 ("PEPO") provided the Commission with an incisive analysis of the Commission's statutory authority to approve ComEd's proposal. The PEPO properly stated "[b]ased on our review of Section 9-201.5, the Commission finds nothing that~~which~~ can reasonably be construed to contemplate continued collections of decommissioning tariffs after the utility sells its plants." PEPO at 17 (redlining in original).

The Order also states that "Section 16-114 creates ~~no~~ a [sic] substantive right in the described entities to recover decommissioning costs after the transfer of nuclear generating units to a third party." Order at 17. The first paragraph of Section 16-114 states:

> On or before April 1, 1999, each electric utility owning an interest in, or having responsibility as a matter of contract or statute for decommissioning costs as defined in Section 8-508.1 of, one or more nuclear power plants shall file with the Commission a tariff or tariffs conforming to the provisions of Section 9-201.5 of this Act, to be applicable to each and every kilowatt-hour of electricity delivered or sold at retail in the electric utility's service area, including, but not limited to, sales by the electric utility to tariffed services retail customers, sales by the electric utility to retail customers pursuant to special contracts or other negotiated arrangements, sales by alternative retail electric suppliers, and sales by an electric utility other than the electric utility in whose service area the retail customer is located; ....

The reference to "responsibility as a matter of contract" does not somehow authorize ComEd to collect decommissioning funds for Genco. In fact, Section 114 does nothing more

than require utilities owning an interest in nuclear plants, and those with "responsibility as a matter of contract" for decommissioning costs, to unbundle decommissioning costs from rates and instead collect them through a separate rider. Section 114 requires a filing before April 1, 1999, with the new riders to be effective no later than October 1, 1999. Section 114 has no applicability to the sale of nuclear plants occurring more than a year later. The PEPO properly notes that the "responsibility as a matter of contract" language was directed to a specific situation and was not intended to create a substantive right to recover decommissioning costs after the transfer of nuclear generating units to a third party. PEPO at 17-18. The PEPO correctly stated:

> At the time that Section 16-114 became law there was an existing situation to which language in question directly applied. As a result of a merger approved by the Commission in 1995, MidAmerican Energy became obligated for decommissioning expenses for a percentage of the Cooper nuclear plant in Nebraska, owned and operated by Nebraska Public Power District. On July 8, 1999, in Docket 97-0569, the Commission granted authority to MidAmerican to collect a decommissioning tariff in satisfaction of this obligation from MidAmerican's ratepayers.
>
> It is therefore fair to assume that the MidAmerican situation, which was pending at the time Section 16-114 was enacted, is the reason for the contractual responsibility for decommissioning language in Section 16-114. The alternative scenario argued by ComEd and Staff conflicts with exact time parameters in the statute and presumes that the legislature chose to address the hypothetical and uncontemplated sale of nuclear plants by including a single phrase in a complex statute with other specific purposes ... The Commission, therefore, finds that Section 16-114 creates no substantive right in the described entities to recover decommissioning costs after the transfer of nuclear generating units to a third party.

PEPO at 17-18 (redlining in original). The Order did not address the PEPO's analysis of the historical context for "responsibility as a matter of contract" language. Granting rehearing will provide the Commission with the opportunity to include the historical context and then draw the necessary conclusion that Section 16-114 creates no substantive right to recover

decommissioning costs after the transfer of nuclear plants to a third party.

The Order concludes that when Sections 9-201.5 and 16-114 are read together, "they clearly provide authority for the Commission to approve decommissioning collections when a utility has responsibility as a matter of contract for decommissioning costs." Order at 17. The PEPO effectively disposed of this argument:

> The Commission does not agree that the legislature intended the result as contemplated by ComEd's interpretation of the relevant statutory provisions. Statutes are only construed together in order to resolve ambiguities that exist in either of them. Kozak v. Retirement Bd. Of Fireman's Annuity and Benefit Fund of Chicago, 95 Ill.2d 211, 447 N.E.2d 394, 399. (1983). Neither Section 9-201.5 nor Section 16-114 of the Act is ambiguous. Neither statute requires a reading of the other to determine its meaning. Neither statute supports ComEd's argument.

PEPO at 18. The Order does not attempt to address Kozak. The short answer is that there is zero authority in Section 9-201.5, zero authority in Section 16-114, and zero plus zero equals zero.

The bottom line is that ComEd's ratepayers cannot be charged for non-jurisdictional plants and their expenses. For years, this Commission has, for example, excluded ComEd's and other utilities' non-jurisdictional assets from the rate base in setting rates. That legal rule applies with equal force here. The Order's legal determination is contrary to law and misinterprets and misapplies the Act.

II. The Order Should Be Revised to Require that ComEd Should Provide Assurances that Non-Radiological Decommissioning Will Be Completed at All of its Nuclear Plants and that Ratepayers Should Contribute Towards Such Decommissioning

The Order concludes that it is inappropriate to include non-radiological decommissioning in the overall cost of decommissioning, stating that the Commission agrees with Staff and Intervenors. For the record, ELPC has consistently argued that non-radiological decommissioning should be included in the overall cost of decommissioning, **if** ComEd provides

assurances that non-radiological decommissioning will be completed at all of its nuclear plants.

ComEd made a compelling case in this proceeding that non-radiological decommissioning, otherwise known as site restoration, will be necessary for each of its nuclear plants. The testimony of ComEd witnesses Thomas S. LaGuardia and Jay K. Thayer, two witnesses with real decommissioning experience, leaves no doubt that non-radiological decommissioning is necessary to remove the dangerous building shells remaining after radiological decommissioning.

While the NRC can be expected to ensure that radiological decommissioning will occur, there is no regulatory body with the responsibility to ensure that non-radiological decommissioning occurs. Despite its compelling case that non-radiological decommissioning is necessary, ComEd has not committed to ensuring that funding is available for non-radiological decommissioning of each of its plants. ComEd witness Robert F. Berdelle, the company's vice president and comptroller, testified that the trust funds would be used to fund non-radiological decommissioning to the extent funds are available. Edison Exhibit 8 at 16. However, he did not commit to non-radiological decommissioning of plants if the trusts do not have adequate funds available. Berdelle did commit to redistributing remaining excess funds from decommissioned plants to the trusts of plants yet to be decommissioned, but that commitment does not help if one of the first plants to be decommissioned does not have adequate funds.

The Commission's determination on non-radiological decommissioning is arbitrary and capricious and not supported by substantial evidence based on the entire record of evidence presented in this proceeding. Upon rehearing, the Commission should condition collection of adequate funds for non-radiological decommissioning upon ComEd agreeing to guarantee that adequate funds will be available for each of its nuclear plants.

III. The Order Should Be Revised to Reduce the Amount of Decommissioning Expenses Permitted, Assuming ComEd Is Legally Authorized to Collect Decommissioning Expenses for Plants It No Longer Owns

The Order permits ComEd to recover $73 million annually in decommissioning costs for the years 2001 through 2004, and, for the years 2005 and 2006, an amount equal to $73 million times the percentage of the actual energy production of the nuclear plants purchased by ComEd in each such year. The Commission's determination of the $73 million amount is arbitrarily and capriciously high and is not supported by substantial evidence based on the entire record of evidence presented in this proceeding. Assuming ComEd is legally authorized to collect decommissioning expenses for plants it no longer owns, and for the reasons stated above it is not legally authorized to do so, the Commission should reduce the amount of decommissioning expenses which ComEd would be permitted to collect.

Conclusion

ELPC respectfully requests that the Commission grant rehearing and that the Order, on rehearing, be revised to conclude that ComEd is not legally authorized to collect decommissioning expenses for nuclear plants that it no longer owns, to require that ComEd provide assurances that non-radiological decommissioning will be completed at all of its nuclear plants and that ratepayers should contribute to such decommissioning, and that, if ComEd is permitted to collect decommissioning expenses for plants it no longer owns, the amount is reduced.

January 18, 2001

Respectfully submitted,

Environmental Law and Policy Center

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NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, January 18, 2001, we filed with the Chief Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62794, the *Application for Rehearing of the Environmental Law and Policy Center* in the above-captioned proceeding by overnight mail.

Daniel W. Rosenblum

CERTIFICATE OF SERVICE

I, DANIEL W. ROSENBLUM, certify that copies of the above Notice of Filing together with the Application for Rehearing of the Environmental Law and Policy Center were served upon all active parties on the Service List by e-mail and by depositing a copy in a properly addressed, sealed envelope with the U.S. Post Office, Chicago, Illinois, with proper postage prepaid on January 18, 2001.

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